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IN THE

Supreme Court of the United States

No. ——

OCTOBER TERM, 1951

THE CREAMETTE COMPANY,
Petitioner,

vs.

T. A. CONLIN, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PRAYER

The Creamette Company, Petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 19, 1951. A Petition for Rehearing was denied October 17, 1951.

OPINIONS BELOW

The opinion of the District Court (R. 297) is reported at 92 Fed. Supp. 301.

The opinion of the Circuit Court of Appeals (R. 384) is reported at 191 F. (2d) 108.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Is it unfair competition for a group of individuals operating jointly and individually a chain of ice cream shops wholly within the State of Florida to appropriate and use, as a trade name for its business and a trade mark for its ice cream, a unique coined word, "Creamette" (or its plural "Creamettes"), with no evidence of use or registration by others, which constitutes the trade name, substantially the corporate name and the registered trade mark of a Minnesota corporation, The Creamette Company, who manufactures a variety of macaroni products and who is also a distributor of candy, soft drinks, and a wide variety of grocery products, including gelatin dessert, tapioca, cornstarch, and canned evaporated milk, and who sells all its products under the sme unique trade mark "Creamette" or "Creamettes" in interstate commerce, and where since 1912 the Minnesota corporation has been using its trade mark on macaroni products and other products in foreign countries and most of the forty-eight States, and wherein it has used its trade name and trade mark within the State of Florida prior to the time of appropriation and use of the trade name and the trade mark by the Florida citizens? (See position of Petitioner at R. 119).

STATEMENT

The Petitioner's predecessor (prior to 1916) in 1912 adopted and began to use the trade mark Creamettes for a new form of cut macaroni and obtained Federal registration No. 90,907 (R. 325) thereof early in 1913. The business in that particular article grew rapidly and in 1916 the Petitioner was incorporated as The Creamette Company, and took over and has continued that business.

While the use and sale originally, and in large measure throughout, was on macaroni products, Petitioner expanded the use and sale to a large number of other products, mostly food products, but including such products as breakfast food, salt, baking soda, etc., grape juice, chewing gum, tea and coffee, spaghetti sauce, cola sweetened and carbonated drink, and a wide variety of staple groceries, including gelatin dessert powder, tapioca, cornstarch and evaporated milk, as shown by registrations in the record (R. 325-333).

Largely because of the attractive character of the trade mark Creamette and Creamettes, the business in the sale of Creamette products has expanded and grown throughout most of the United States and in foreign countries, although expensive and widespread advertising no doubt helped the extending of sales and reputation. From 1922 to the end of April, 1950, as shown by detailed statements, the amount spent for advertising (R. 375) was $1,842,349.06, of which $333,390.84 was expended in 1949, and the sales of Creamette products sold under the trade marks here in issue amounted to $19,721,748.76 (R. 224). Extensive business and advertising in Florida, beginning before any of defendants' accused acts, also is shown (R. 93-96; 375-377, 379).

The Defendant T. A. Conlin came to Florida in 1947, and after making arrangements with a Wisconsin manufacturer of ice cream machines, applied for and on October 10, 1947, obtained a State Registration for the trade mark "Creamette" for a frozen dessert resembling ice cream. Defendants' product is made and sold from roadside stands and purchasers may obtain small quantities to be eaten adjacent the premises, or they may obtain larger quantities for home consumption. Conlin and several members of his family organized a business for

licensing others to obtain machines and the unfrozen mixture used to make the dessert, but each licensee agreed that the business would operate under the fictitious name of "Creamette" (Appendix C) and that all advertising should prominently display the name "Creamette" (R. 72). The product when sold in paper containers in some appropriate manner bore the trade mark "Creamette" (R. 381, Appendix B). The eleven Defendant business entities therefore bound themselves by contract with Conlin to use Petitioner's trade name and corporate name as their business name.

Appendix A (R. 108) is a reproduction of Petitioner's trade mark and trade name. Appendix B (R. 381) is a reproduction of Defendants' trade mark as registered in Florida, and Appendix C (Plaintiff's Exhibit 23) is a reproduction of one of the Defendants' places of business showing the trade name and trade mark. It will be noted by comparing Appendix A and Appendix B that the marks of the two parties both consist of a large letter "C" with the remainder of the word appearing in lower case or script type with the "r" partially enclosed within the "C" and in each instance the "tt" crossed by a single bar.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing and refusing to enjoin the Defendants from using Petitioner's unique trade name, corporate name and trade mark.

2. In failing to recognize that minor differences in goods of the parties is not a controlling factor when the trade name and trade mark is a unique coined word.

3. In holding that in the absence of direct proof of fraud, even though the names and marks are substantially identical in appearance, the Defendants were entitled to use Petitioner's name and mark.

4. In holding that "Creamette" which is not in the public domain is descriptive of ice cream.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is in direct conflict with a previous decision of this court, *American Steel Foundries v. Robertson,* 269 U. S. 372, 46 S. Ct. 160, and is in conflict with the decisions of several of the Circuit Courts, some examples of which are listed below.

Second Circuit, *Triangle Publications, Inc. v. Rohrlich et al.,* 167 F. (2d) 969.

Eighth Circuit, *Hanson v. Triangle Publications, Inc.,* 163 F. (2d) 74.

Ninth Circuit, *Stork Restaurant v. Sahati,* 166 F. (2d) 348.

In *American Steel Foundries v. Robertson,* this Court held that—

> "Equity will enjoin appropriation and use of a trade mark or a trade name identical with the name of a corporation * * * where the resemblance is so close as to be likely to cause confusion as to identity, to the injury of the corporation to which the name belongs."

It is the contention of Petitioner that the trade mark was first used by Petitioner for any food product and has been used by no others except the Defendants herein, and others who have previously discontinued use at the behest of Petitioner either voluntarily or, as a result of a Court Decree. It is further contended that the

trade name and the trade mark is a *coined word having no existence in language prior to its coining by Petitioner, and that it has no other meaning than that given it by Petitioner.* Thus it qualifies as a *strong* trade mark *as defined by the Second Circuit Court of Appeals in France Milling Co. v. Washburn-Crosby Co.,* 7 F. (2d) 304, 306.

The distinction between "strong" and "weak" trade names and trade marks was adequately discussed in *American Steel Foundries v. Robertson.* The degree of protection given to a strong trade name is best stated in the *Stork Restaurant* case, where it was held—

> "Equity gives a greater degree of protection to 'fanciful trade names' than it accords to names in common use."

There a tavern or cocktail lounge in San Francisco was enjoined from using the trade name "Stork Club" because of its prior appropriation and the great value established in the name by the New York restaurant.

On the other hand, *S. C. Johnson & Son v. Johnson,* 175 F. (2d) 176, decided by the Second Circuit, is an example of a *weak* name. The Court held that the trade name and trade mark "Johnson" was the mere surname of a great many people and therefore would not extend beyond the identical products sold by the Plaintiff.

This same view of a *weak* trade mark was taken by the Ninth Circuit in *Sunbeam Lighting Co. v. Sunbeam Corp.,* 183 F. (2d) 969, where the trade mark "Sunbeam" was held to be in common use, and its protection extended only to the goods made by the plaintiff.

Thus both the Second Circuit (the *Triangle* and the *Johnson* cases) and the Ninth Circuit (*Stork Restaurant* and *Sunbeam* cases) have clearly defined the differences between *strong* and *weak* trade names and trade marks.

In the *Johnson* case judgment was sought under the Lanham Act, 15 U. S. C. 1114(1), that because there was liability of confusion an injunction should issue. Where the word Johnson was the surname of a vast number of people and had been used on many products, the Court of Appeals refused to extend the Lanham Act so far. But significantly to the facts of the case at bar the court, by Judge L. Hand (page 180), there held as follows:

> "In the case of *fabricated* marks which have no significance, save as they denote a single source or origin of the goods to which they are attached, the user's right may indeed go so far. The second user can then show no interest of his own; and if, *as will then appear,* his only purpose is to trade on the first user's good-will, it is indeed time to intervene." (Italics added.)

Nor does the fact that Defendants do business wholly within the State of Florida change the circumstances, for Petitioner was the first to enter Florida. In *Hanover Star Milling Co. v. Metcalf,* 240 U. S. 403, 36 S. Ct. 357, it was established that the first appropriator of a trade mark within any selected state, was entitled to the exclusive use of the mark within that State. This is equally applicable to trade names as held by the Tenth Circuit in *Standard Oil Co. of New Mexico, Inc., v. Standard Oil Co. of California,* 56 F. (2d) 973; and by a District Court in Maine in *Standard Oil Co. of New York v. Standard Oil Co. of Maine, Inc., et al.,* 38 F. (2d) 677.

2. The decision of both Courts below in this case was apparently influenced by the fact that there was a difference in goods to which the trade name and trade mark of the respective parties had been used in the *State of Florida.* It is true that Petitioner, who is pri-

marily a manufacturer of macaroni products, but is nonetheless also a bona fide distributor of many other food products, had only established its trade name and trade mark in Florida on macaroni products, specifically the trade mark "Creamettes" in connection with elbow macaroni and the trade mark "Creamette" in connection with spaghetti and noodles; whereas the Defendants did business in a frozen dessert resembling and sometimes called ice cream. Nevertheless, Petitioner does sell dessert products, namely, a gelatin powder resembling "Jello" which when dissolved in boiling water must be later refrigerated to form a jelly-like dessert, and also cornstarch and evaporated milk, which may form the main constitutents of one type of ice cream. Thus the goods of the two parties are in fact very closely related, even if they are not competitive.

It is true that Petitioner had not made sales in either of these latter products in Florida, and that such products constitute only about 1% of Petitioner's business. Nevertheless, Petitioner's business in these products is bona fide, and of sufficient importance to warrant consideration even if they were not sold in Florida at the time preceding the suit. A similar situation is found in *R. H. Macy & Co., Inc. v. Macy's Drug Store, Inc., et al.*, 84 F. (2d) 387, where it was established that the large New York store maintained a drug department and was entitled to an injunction against the use of its trade mark and trade name by a drug store operated in Philadelphia. The total sales of Macy's Drug Department as compared to the other departments of this huge establishment would not greatly exceed 1% of the total business of the organization, but nevertheless appropriation of the trade name was enjoined. A further similar situation is found in *R. H. Macy & Co., Inc. v. Macy's, Inc.,*

39 F. (2d) 186, where an Oklahoma firm attempted to appropriate the trade name of the New York firm for use on women's apparel.

Nor in the larger sense, as the law is interpreted with respect to *strong* names and marks, is a difference in goods a controlling factor. In relatively recent decisions of the Second and Eighth Circuits, *Triangle Publications, Inc. v. Rohrlich, et al.,* 167 F. (2d) 969, C. C. A. 2, and *Hanson v. Triangle Publications, Inc.,* 163 F. (2d) 74, C. C. A. 8, where the term "Seventeen" was applied to a *magazine publication* for young women it was held to be sufficient basis to enjoin the term "Miss Seventeen" as applied to *girdles* and *dresses.* This policy of protecting a strong trade mark against appropriation by others on different forms of goods is neither new nor unique. In Note 1, found in *Standard Oil Co. of New Mexico v. Standard Oil Co. of California,* 56 F. (2d) 978, C. C. A. 10, the Court listed about twenty cases that have been decided in this manner. The fundamental policy is simply stated by Judge Learned Hand in *Yale Electric Corp. v. Robertson,* C. C. A. 2, 26 F. (2d) 972, 974.

> "However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal * * *. If another borrows it he borrows the owners reputation * * * for a reputation is like a face * * * and another can use it only as a mask."

Had this controversy arisen out of a right of Federal registration of the trade mark to the Defendant, the Patent Office, who is the guardian of the public interest in trade mark registration proceedings, would have ruled against the Defendant, because Section 2(d) of the 1946 Act, 15 U. S. C. 1052, would prohibit registration.

In numerous decisions, the Court of Customs and Patent Appeals has laid down the fundamental principles as to "similarity of the goods", and in the case of a "strong" trade mark virtually all goods are included. *Law and Contemporary Problems, Duke University,* page 288.

3. The Court below was largely influenced by the fact that Respondent had pleaded but, as the Court contended, had failed to prove "fraud" in connection with the appropriation of its trade name and trade mark. By merely viewing the appended photographs of the two names and marks it will be seen that both parties use a capital "C" partly enclosing the first small letter with the remaining letters of the names appearing in small case letters and the letters "tt" crossed by a single bar. Despite the lack of proof by admission, it could hardly have been an accident for the Defendants on October 10, 1947, App. B, to have compounded the name in this manner without having been influenced by seeing Petitioner's name. But such proof is not required under decisions of the more highly commercialized areas, such as in *Ronson Art Metal v. Fink,* 70 N. Y. Supp. (2d) 196, held—

> "Neither bad faith, confusion or deception need be shown to entitle Plaintiff to injunction."

A condensed discussion of the entire subject matter as it is now interpreted is found in the *Duke Law School Publication, Law And Contemporary Problems, Trade Marks in Transition,* pages 188, 189, where the subject of *dilution* of marks is described. Dilution may occur even where the defendant is a non-competitor if the goods are in any way related because the confusion in such a case constitutes a *confusion of the business.* In this case, while the goods are not exactly compet-

ing, it cannot be said that the two businesses are totally unrelated to each other, nevertheless the net result is a *dilution or whittling away* of the value of an important trade mark and trade name which has never before been used by others.

Thus the common use of the explanation "unfair competition" is misleading. It carries the implication of a rule that no longer prevails, namely, that a cause of action for "unfair competition" presupposes the existence of *competition* between the parties. As stated by Judge Woolley (C. C. A. 3):

> "There was at one time a rule of law on which the defendants stand and at which they stop, to the effect that there can be no unfair competition unless there is actual competition of some kind. *Borden Ice Cream Co. v. Borden's Condensed Milk,* 201 Fed. 510. But the law since then has taken a forward step * * *. *Kotabs, Inc. v. Kotex,* 50 F. (2d) 810."

Moreover, since a trade name, a trade mark and a corporate name were defined by this Court in *American Steel Foundries v. Robertson* as *property,* it is not necessary under this modern interpretation to prove "fraud", rather it is only necessary to establish the trespass. And under the doctrine laid down in the two *Standard Oil* cases, equity favors the diligent.

4. The Court below was clearly erroneous in holding that the trade mark "Creamette" is descriptive of Defendants' goods. It is irrefutably established that the trade mark "Creamette" was a new and fanciful word originating with Petitioner's predecessor, and one which was coined by Petitioner's predecessor and therefore never found use in the English language prior to its adoption and use. The case comes clearly within the definitions set forth in *Standard Paint Company v.*

Trinidad Asphalt Mfg. Co., 220 U. S. 446, 31 S. Ct. 456, where the term "Ruberoid" was applied as a trade mark for flexible water-proof roofing. Quoting from previous decisions, the Court held—

> "A trade mark, it was hence concluded, 'must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association'."

The Court there held that the term "Ruberoid" was a mere misspelling of a generic term—rubberoid—a material defined in the Century Dictionary as a trade name for an imitation hard rubber. In other words, the plaintiff in that case was not the originator of "rubberoid", which was the generic name for an imitation rubber, because its roof covering contained no rubber whatsoever, and the trade mark was a mere misspelling of the generic term. This sharply distinguishes from the use of Creamette, a unique coined word, with no reasoning in and of itself.

In this case, the Court below using "Cream of Kentucky" for whiskey and "Cream of Wheat" for breakfast food held that because some of Petitioner's advertising referred to its product as the "Cream of macaroni" that the mark was in fact a mere carrying forward of these other marks. That is not so, but even if it were true, "Cream of macaroni" is not the name or mark here in issue.

To support its contention the Court below relied on the Ninth Circuit decision of *Sunbeam Lighting Co. v. Sunbeam Corp.,* 183 F. (2d) 969, where the Court *distinctly held that Sunbeam was a weak mark and name frequently used by others,* which is equally true in *Philco Corp. v. Phillips Mfg. Co.,* 170 F. (2d) 958; and in *Arrow Distilleries v. Globe Brewing Co.,* 117 F. (2d)

347, all of which decisions also held that with a strong, fabricated mark injunction would lie.

In short the Court below did not follow the decisions which it cited, but rather it ruled exactly opposite to those decisions.

Before the term "Creamette" can be held to be a weak mark it must be shown that it was in common use, and before it can be held to be descriptive of Defendants' ice cream it must be shown that the word was in the public domain as meaning "ice cream composed of little cream", and it should be distinctly stated that neither "Creamette" nor "Creamettes" will be found in any dictionary, or in any lawful use other than on Petitioner's products, or in Petitioner's trade name.

CONCLUSION

Many of the authorities cited above were by brief, argument and petition for rehearing brought to the attention of the Court of Appeals to show the errors in the decision of the District Court. Nevertheless a pertinent part of the Circuit Court's decision (R. 389) is—

> "Though the broad question is strenuously urged by the appellant here, we find it unnecessary to, and therefore will not, explore the full extent of protection to which the adoption, use, advertisement and promotion of the trade mark Creamette may entitle the plaintiff."

Clearly, therefore, the decision of the Fifth Circuit Court of Appeals is not only creating an irreconcilable conflict with decisions of other Circuit Courts which have been accepted law for more than the last twenty-five years, but its decision is in conflict with numerous decisions of this Court, and therefore has so far departed from the accepted course of judicial proceedings that it

is in the interest of the public generally that this Court grant the Petition for Certiorari to resolve these conflicts and provide a more uniform interpretation of the law relative to "unfair competition," since virtually every business venture must have an intra-state beginning.

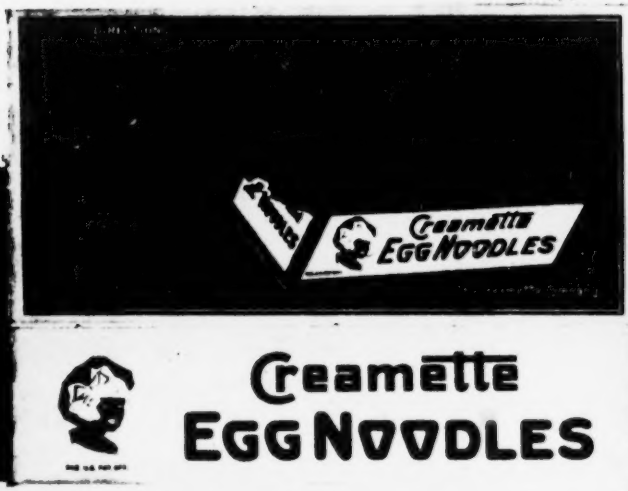
Respectfully submitted,

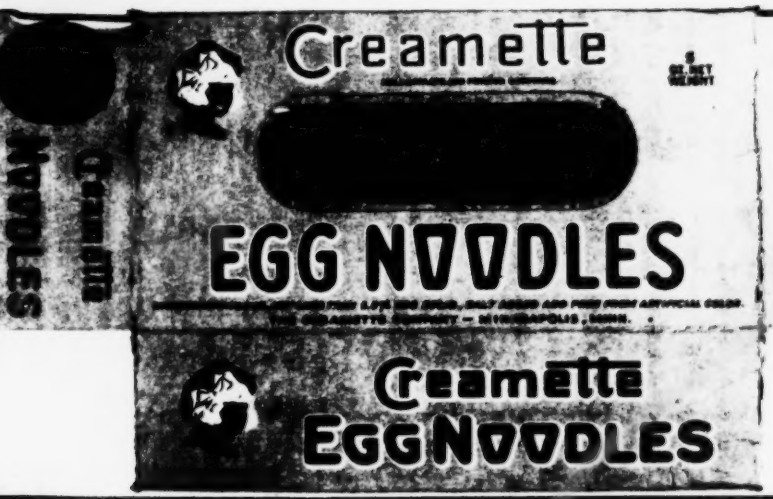
FRANK A. WHITELEY,
Counsel for Petitioner.

APPENDIX

APPENDIX A

Petitioner's trade mark and trade name.





SAMPLES OF TRADE MARKS PRODUCED IN ANSWER TO INTERROGATORY 15

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appendix B

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STATE OF FLORIDA
OFFICE SECRETARY OF STATE

I, R. A. GRAY, Secretary of State of the State of Florida, do hereby certify that T. A. COHLIN, 419 N. Wild Olive, Daytona Beach, Florida, has made application to this office for registration of a trade-mark as follows:

Said trade-mark to be used on frozen dessert. I further certify that I have this day caused said application to be duly filed in this office as required by Law.

GIVEN under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the tenth day of October, A. D. 1947.

R. A. Gray
SECRETARY OF STATE

APPENDIX B

Respondents' Florida registration.

Office - Supreme Court, U. S.
FILED
FEB 15 1952
CHARLES ELMORE CROPLEY
CLERK

14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 542

THE CREAMETTE COMPANY,
Petitioner,

versus

T. A. CONLIN, et al.,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

GREEN AND BRYANT,
WILLARD AYRES,
Counsel for Respondent.

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BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court (R. 297 et seq.) is reported in 92 Fed. Supp. 591, and not on page 301 as indicated in the Brief of Petitioner.

The opinion of the Circuit Court of Appeals is reported in 191 Fed. (2d) 108 and is not shown in the transcript of record.

JURISDICTION.

The Petitioner is seeking to invoke the jurisdiction of the Court under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

In a case limited to unfair competition under Florida law, is petitioner entitled to an unlimited monopoly on the use of the word "Creamette" on all products whatsoever, regardless of the fact that the products of the parties are dissimilar, regardless of the fact that Respondents is not in competition with Petitioner, regardless of the fact that no confusion has been shown to have occurred or would likely occur in the future, regardless of the fact that no fraud has been practiced by Respondent, regardless of the fact that the name was adopted by Respondents in good faith with no knowledge of the prior use of the name by petitioner on other products, and with no intention of trading on its reputation, regardless of the fact that the name in question is plainly descriptive of the product sold by Respondents, and regardless of the fact that the name is at least suggestive of the quality which Petitioner desires to attribute to its own goods?

SUMMARY OF ARGUMENT.

We do not feel it necessary or appropriate to burden the Court at this time with an exhaustive brief of the law

on the subject of trademarks and unfair competition. The opinion of the Court below reported in 191 Fed. (2d) 108 contains an accurate summary of the facts involved in this controversy and an excellent exposition of the law relating thereto. As stated by the Court below there is not so much dispute and difference as to the fundamentals law as there is in the application thereof. Despite the finding of two lower courts that the word "Creamette" is descriptive of the product manufactured by Respondents, much of Petitioner's argument is based upon the assumption that the name is completely arbitrary and fanciful and hence entitled to a wide protection and that failure of the lower courts to grant it such protection makes its ruling inconsistent with cases in other circuits where protection was given to *strong* trademarks and under circumstances substantially different from that disclosed by the record herein. As indicated above our argument here will not be exhaustive but will be in the form of a reply to the authorities cited by Petitioner and showing the distinguishing features between the present case and the cases cited by Petitioner.

ARGUMENT.

The Petitioner has listed four "reasons" for what it concludes to be proper grounds for granting a writ of certiorari. We will reply to these in the same order as listed by Petitioner.

1. *The decision of the court below is not in conflict with the previous decisions of this Court nor is it in con-*

flict with decisions of several of the circuit courts as contended by Petitioner.

It is the contention of Petitioner that the decision of the Court below is in conflict with the decision of this Court in the case of *American Steel Foundaries vs. Robertson, 269 U. S. 372, 46 S. Ct. 160.* It would seem that counsel for Petitioner did not examine the *American Steel* case very carefully as in that case this Court had before it for consideration the word "Simplex", the word used by the contending parties, and held that because of its "peculiarly suggestive meaning" it was not entitled to a great deal of protection. It holding that it did not appear that the use of the word "Simplex", this Court, among other things, said:

> "The mere fact that one person has adopted and used a trademark on his goods does not prevent the adoption and use of the same trademark by others on articles of a different description. There is no property in a trademark apart from the business or trade in connection with which it is employed."

In contending that the decision of the court below is in conflict with decisions of circuit courts, the first case cited by Petitioner is that of *Triangle Publications, Inc. vs. Rohrlich, et al., CA 2, 169 Fed. (2d) 969.* In that case the plaintiff was the publisher of a magazine "Seventeen" for girls thirteen to eighteen years of age. The magazine became an important medium for advertising teen-age apparel and accessories, and a large proportion of the users of the apparel had acquired a belief that articles, including girdles, advertised in or mentioned editorially by the

magazine had an added desirability. The Court held that the word "Seventeen" was arbitrary and fanciful and not descriptive of the magazine or its subject matter and, further, that the defendant, manufacturer of girdles, "*deliberately chose their name in order to take advantage of the likelihood of confusion with plaintiff's magazine and the attribution of some of their sales to its sponsorship.*" Thus it is readily seen that the *Triangle Publication* case had in it two features completely absent from the case at hand, viz. the fact that the name used was arbitrary and fanciful and the fact that the defendant deliberately adopted the name of plaintiff for the purpose of creating confusion and taking advantage of the reputation of the plaintiff. As revealed by the record in the decisions of the two lower courts, the word "Creamette" was adopted by these Respondents in good faith and with no knowledge whatsoever of the prior use of the term on different food products by the Petitioner herein. We also emphasize the fact that both lower courts held that the word used was descriptive of the product sold by the Respondent.

The second case cited by the Petitioner is that of *Hanson vs. Triangle Publications, Inc. CA 8, 163 Fed. (2d) 74.* This is another case by publishers of the magazine "Seventeen". As a part of its business scheme, the magazine began selling reprints, counter cards and blow-ups of its advertisements and style comments for use in store displays. It sold hang-tags for use on garments on sales racks featuring the words "You saw it in Seventeen". Up to the time of trial over a million of such hang-tags had been sold. The defendant started manufacturing dresses for teen-age girls, named and labeled "Seventeen for the

Junior Teens." Here again it appears that the defendants were deliberately "seeking to trade on or take unfair advantage of the magazine's fame, reputation and good will" by furnishing dealers with hang-tags, such as the magazine did, in which the word "Seventeen" was emphasized. Again the distinguishing features between that case and the one at hand are obvious.

A third and final case relied upon by Petitioner in support of its contention that the decision of the Court below is in conflict with that of several of the circuit courts in the case of *Stork Restaurant vs. Sahati, CA 9, 166 Fed. (2d) 348.* This case resulted from the use of the name "Stork Club" by the operators of a bar, tavern and cocktail lounge in San Francisco. Plaintiffs had been the prior users of the name and the Court granted it protection in the use thereof by correctly holding that:

> " 'Stork Club' is a tradename that, in the language of the books, might well be described as 'odd', 'fanciful', 'strange', and 'truly arbitrary'. It is in no way descriptive of the appellant's nightclub, for in its primary significance it would denote a club for storks. Nor is it likely that the sophisticates who are its most publicized customers are particularly interested in the stork. It is not a tradename that would naturally suggest itself for a fashionable restaurant."

The Court of Appeals then went on as a finding of fact to state that the defendant had been attempting to reap where he had not sown and was "riding on the coat tail" of a senior appropriator of a tradename.

In making its argument in this particular feature of the case, the Petitioner has incorrectly assumed that the name "Creamette" is arbitrary, fanciful and suggestive of nothing except the origin of the goods. The Court will observe that the cases cited by Petitioner in such regard are all cases wherein the Court made an affirmative finding that the name in controversy was arbitrary and fanciful, whereas in the instant case the Court below held (page 112 of opinion) that this name is *"plainly and accurately descriptive"* of the name of the product handled by respondents.

2. *The decision of both courts below are correctly influenced by the fact that there was a difference in goods to which the tradename and trademark of the respective parties had been used.*

The Petitioner admits that there is no competition existing between the parties but contends that the goods of the two parties are in fact closely related. In this contention it finds itself in disagreement with the Federal District Judge before whom the case was tried and also with the learned Judges of the Court of Appeals who held (page 111 of opinion) that:

> "The products of the appellant and appellees are distinctly different and are similar only in that they are food products. Even in this respect, however, they are dissimilar in that appellant's macaroni and spaghetti must be cooked and prepared prior to consumption, while appellee's product is ready to eat when sold, and is a novelty or dessert."

It is clear to us that the Petitioner is attempting to monopolize the food market by the monopoly of their tradename, a practice denounced in no uncertain terms by the Court of Appeals, 7th Circuit, in the case of *California Fruit Growers Exchange vs. Sunkist Baking Company, 166 Fed. (2d) 971* wherein the Court said:

> "The unconscionable efforts of the plaintiff to monopolize the food market by the monopoly of the word 'Sunkist' on all manner of goods sold in the usual food stores should not be sanctioned by the courts. The trademarks should be confined substantially to the articles for which they are authorized, otherwise, why limit the marks at all? . . . We are unable to see how one purchasing bread could be likely to be confused as to the origin of the bread, although sold under the trademark valid for fruits and vegetables. Certainly this must be true where bread has never been sold by the owner of said trademark, valid as to fruits and vegetables.
>
> "Unless 'Sunkist' covers everything edible under the sun, we cannot believe that anyone whose I. Q. is high enough to be regarded by the law would ever be confused or would likely be confused in the purchase of the local bread branded as 'Sunkist' because someone else sold fruits and vegetables under that name."

In this section of the argument the Petitioner again incorrectly assumes that "Creamette" is a *strong* trademark and again reviews cases mentioned in his first point showing a wider latitude of protection for words falling in such category. We feel it unnecessary to labor this point of the argument further.

3. *The Court below was properly influenced by the good faith of these Respondents in the use of the name "Creamette" as applied to their products.*

The Petitioner maintains that although he alleged fraud in its original complaint, such is not an essential part of the case and then indicates that confusion of business or deception might be sufficient. Were we to concede that such is the law, Petitioner still does not bring himself within the requirements of his own statement of the law as there is no evidence whatsoever in the record that any confusion ever existed or was likely to exist in the future. Speaking on this subject the Court of Appeals said (page 111 of opinion):

> "It is not shown that there has been any confusion as to the source of the products in question, nor was any evidence introduced to support the view that there was likely to be any such confusion."

4. *The Court below was correct in holding that the name "Creamette" is descriptive of goods of Respondents.*

It is the contention of Petitioner (page 13 of its Brief) that before the word "Creamette" can be held to be a weak mark it must be shown that it was in common use, and before it can be held to be descriptive of defendant's ice cream it must be shown that the word was in the public domain as meaning "Ice cream composed of little cream." We cannot understand the logic of that statement nor do we find any authority supporting the contention. It is true that the word "Creamette" is not to be found in a dictionary. However, the component parts thereof are

found in any standard dictionary. In addition to being defined as the rich part of milk, in a broader field cream is generally understood to mean the best or choicest part of a thing. The New Century dictionary of the English language defines "-ette" as:

> "A noun suffix, the feminine form of et, occurring especially (a) with the original diminutive force as in chemesette, cigarette, pinette, statuette, (b) in *trade-names of imitation or substitutes, as in leatherette.* . . ."

From the above definition of "-ette" it is obvious that the word "Creamette" means a commodity like cream, or a substitute of cream, or an imitation of cream as clearly and definitely as if the word itself were in the dictionary.

We submit that the word "Creamette" is not only clearly descriptive of the imitation ice cream produced by Respondents, but it is also suggestive of the qualities which Petitioner would like to have associated with its products. Our thoughts along this line are well expressed in the opinion of the Court below when it said (page 112 of opinion):

> "A frozen sweet, or dessert, which is not made from the customary ice cream mix, but is similar to it, may well be called Creamette because it is an imitation or substitute of cream. Philco Corp. vs. Phillips Mfg. Co. 7 Cir., 133 Fed. (2d) 663, 148 ALR 125; Philco Corp. vs. F. and B. Mfg. Co., 7th Circuit, 170 Fed. (2d) 958. The word 'Creamette', of course, carries well-known connotations. We know by one usage, as recognized by the dictionary, that there is a 'commercial use of -ette to form names of imitation or sub-

stitutive material.' Furthermore, while Creamette is not generally descriptive of appellant's macaroni its use in connection therewith carries one of the well-known connotations of cream,—as the best or choicest part of a thing. This is recognized in some of appellant's advertising in which the macaroni is referred to as the 'cream of macaroni' and made from the 'creamy' parts of wheat. The same thought has been used by others, —'cream of wheat' for a breakfast cereal, and 'cream of Kentucky' for an alcoholic liquor."

CONCLUSION.

By reason of the above we respectfully submit that the opinions of the lower Courts were correct in all respects and that the petition for writ of certiorari should be denied.

Respectfully submitted,

GREEN AND BRYANT,
WILLARD AYRES,
Counsel for Respondent.

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Office - Supreme Court, U. S.
FILED
FEB 25 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 542

THE CREAMETTE COMPANY,
Petitioner,

vs.

T. A. CONLIN, et al.,
Respondent.

PETITIONER'S REPLY BRIEF

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AT. 3539 Hayward-Court Brief Printing Co., Minneapolis 15, Minn. AT. 3539

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IN THE

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REPLY

GENERAL STATEMENT

Because the United States Patent Office has issued a decision on petitioner's registered trade marks that are before the Court in this case since the petition for writ of certiorari was filed, and because respondent's brief opposing the petition effectively challenges the applicability of the Trade Mark Act of July 5, 1946, known as the Lanham Act, to *instrastate* commerce when the same interferes with *interstate* commerce, it is believed fitting and appropriate for petitioner to file a brief reply.

RECENT PATENT OFFICE DECISION

On February 6, 1952, the examiner of Trade Mark Interferences (United States Patent Office) issued a decision relating to petitioner's trade mark CREAM-

ETTES and CREAMETTE in the case of *The Creamette Company v. Red Dot Foods, Inc.*, Opposition 29,101 (not yet published). In this case an application to register by Red Dot Foods, Inc., the trade mark "KORN-ETTES" for "corn chips, a food product made from corn mash which is baked or fried," was opposed by The Creamette Company, Petitioners here and denied registration under the Act of 1946 because of the prior use of the trade mark CREAMETTES and CREAMETTE (Petitioner's trade marks at issue in this case) applied to a variety of food products including macaroni, vermicelli, spaghetti, noodles, breakfast foods, unpopped popcorn, and potato chips, on the grounds that CREAMETTES and CREAMETTE were deemed to be arbitrary and that "Cream," which in sound and composition is not entirely unlike the word "KORN" occupying a similar position in the applicant's mark, and would be likely to cause confusion or mistake or deception of purchasers when applied contemporaneously to the goods involved.

To support his decision the Examiner cited a decision of the Commissioner of Patents, *Kraft Cheese Company of Wisconsin v. The Fisher Dairy and Cheese Co.*, 70 U. S. P. Q. 544, 591 O. G. 666, where the notation "Eatette" as a trade mark for processed cheese, was held to be confusingly similar to Kraft's trade mark "Pabst-ett" and "Munst-ett." The pertinent part of the Commissioner's decision which is highly in point is:

> "After noting that the examiner, citing dictionary definitions of the suffix '-ette,' concluded therefore that no one may preempt the field with respect to marks incorporating such a commonly used suffix, it was held that as applied to cheese, *'ett' and 'ette' are purely arbitrary terms, which are subject to exclusive appropriation;* and in applicant's mark there is nothing else that is capable of trade-mark

significance, for certainly the word 'eat' could not serve to denote the origin of a food product; so that applicant has thus appropriated a prominent portion of opposer's marks as the dominant part of its own, and by setting it off with a hyphen has enhanced the resulting similarity." (Italics supplied.)

THE TRADE MARK ACT OF JULY 5, 1946

The manner in which respondent has directed the "Questions Presented" challenges the effectiveness of the federal regulations of unfair competition within the state of Florida.

The petitioner is the owner of a number of federal trade mark registrations, all of which have been brought within the jurisdiction of the Trade Mark Act of July 5, 1946, and therefore it is contended that since petitioner does business in interstate commerce that the interpretation of the extent of protection granted by those registrations should be governed by the federal interpretation of "unfair competition" both as the same is regulated by quasi judicial bodies such as the tribunals of the United States Patent Office, and by the Federal courts.

This contention is adequately supported in recent decisions of the Supreme Court. In *Wickard v. Filburn,* 317 U. S. 111, 63 S. Ct. 82, Mr. Justice Jackson quoted from the opinion of Mr. Chief Justice Stone in *United States v. Wrightwood Dairy Co.,* 315 U. S. 110, 62 S. Ct. 523, as follows:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. * * * The power of Congress over interstate commerce is

> plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. *Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.*" (Italics supplied.)

In *United States v. Wrightwood Dairy Co.*, Mr. Justice Stone quotes a number of examples of where the Congressional power to regulate interstate commerce has been applied to intrastate activities, such as the power to regulate safety appliances on railway cars, intrastate rates of a common carrier, inspection of tobacco produced intrastate and destined to consumers within the state as well as without, as well as practices which are wholly intrastate but which may be reached by the Sherman Act.

Thus it is evident that this case is not primarily concerned with the rights of two parties, but touches upon substantially every registered trade mark in the United States, and particularly those which have developed into fame through great expense and enormous effort of their owners, and that might be pirated by intrastate users.

The new trade mark Act had among other purposes, the necessity of consolidating into one body of law a uniform interpretation of the extent of trade mark protection throughout the nation and to prevent the establishment of 48 different interpretations of what constitutes "unfair competition." A full discussion of this theory is set forth in *Bulova Watch Co., Inc. v. Stolzberg*, 69 F. Supp. 543, a case relatively similar to the one at bar, where the use of the trade mark "Bulova" by a

small merchant on shoes was enjoined because of the plaintiff's prior use for nearly fifty years of "Bulova" on watches. Most important, however, was the fact that the Court ruled that *federal interpretation of unfair competition would apply despite the intrastate nature of defendant's business.* (Italics supplied.)

CONCLUSION

Because the United States Patent Office, through its experts who are daily interpreting the federal effect of the Act of July 5, 1946, has given an interpretation to petitioner's trade marks which is correct and is clearly conflicting with what is believed to be an incorrect interpretation by the Fifth Circuit Court of Appeals, and because the power of Congress to legislate uniform laws relating to unfair competition is seriously challenged, it is urged that the petition for writ of certiorari be granted.

Respectfully submitted,

WHITELEY & CAINE,
BENEDICT DEINARD,
Counsel for Petitioner.

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In the Supreme Court of the United States

No. 542
October Term, 1951

THE CREAMETTE COMPANY,
Petitioner,

vs.

T. A. CONLIN, et al.,
Respondent.

(A). MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed Petition for Rehearing of the Order of this Court denying the Petition for Writ of Certiorari in this case, entered on March 3, 1952.

Rehearing is sought at this time because, as is pointed out more fully in the annexed Petition, since the decision in this case by the Court of Appeals for the Fifth Circuit, the Court of Appeals for the Second Circuit filed a decision in *Dad's Rootbeer Co. v. Doc's Beverages, Inc., et al.,* 193 F. (2d) 77, which is in direct conflict with the decision in this case. Still more important, and to show that a new trend has occurred since the decision in this case, a recent decision by the Court of Appeals for the Fifth Circuit in *Bulova Watch Co., Inc. v Steele, et al.,* 194 F. (2d) 567, is also in conflict with the

decision in this case which was originally filed on July 19, 1951.

Both of these Courts in passing down these recent decisions, considered themselves to be pioneering in interpreting the new Trade Mark Act which went into effect on July 5, 1947. The conflict between the decision in this case and the more recent decisions is that originally it was decided that an intrastate infringer of a Federally registered trade mark was not liable under the Trade Mark Laws, but these later decisions have now reversed this position and even extended it to the point where infringement in a foreign country (Mexico) may be enjoined when jurisdiction of the person of the infringer is obtained within the United States.

Because of the new trend which has transpired since the date on which the Fifth Circuit Court of Appeals filed its decision in this case, it is considered that a condition has arisen which should be resolved by this Court.

Although this Petition for Rehearing is filed after the expiration of the time prescribed in Rule 33, the grounds upon which it is based arose after such time; and the Court clearly has power in its discretion to entertain the Petition. *Clark v. Manufacturers Trust Co.*, 338 U. S. 953; *Roberts Sash & Door Co. v. The United States*, 282 U. S. 829.

Counsel for Petitioner.

(B). PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its Order of March 3, 1952, denying the Petition for Writ of Certiorari, 72 S. Ct. 560, and that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Fifth Circuit in the above titled case as prayed for in the Petition filed January 17, 1952, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time that Petitioner presented its original reasons for granting the Writ, the jurisdiction of the Trade Mark Act of July 5, 1946 (Lanham Act), as to intrastate infringement of a Federally registered trade mark had not been decided by any of the Circuit Courts of Appeals although it had been mentioned in connection with a suit for unfair competition in a decision of the Ninth Circuit in *Stauffer v. Exley,* 184 F. (2d) 962, but this was not a well accepted decision and it was critically discussed by reviewers in *64 Harv. L. Rev.,* 1209, and *37 Va. L. Rev.,* 626. Since that time however, a new concept of the Act has come into existence and in *Dad's Rootbeer Co. v. Doc's Beverages, Inc., et al.,* 193 F. (2d) 77, the Circuit Court of Appeals for the Second Circuit, after delving more thoroughly into the aspects and legislative history of the new Law, held that it is indeed applicable to intrastate commerce, but nevertheless it observed "that the extent of Federal power is not yet settled". Before the Lanham Act came into existence it was settled law that Federal remedies for trade mark

infringement applied only when defendant's infringing actions were themselves in *interstate commerce, U. S. Printing & Lithograph Company v. Griggs-Cooper & Company,* 279 U. S. 156, 49 S. Ct. 267. In commenting on the extent of Federal power under the new Act Judge Clark in speaking for the Court took the position that in the light of recent Supreme Court decisions the owner of a Federally registered trade mark whose goods are in interstate commerce would be adversely affected by the infringement of a user whose extent of use was wholly intrastate.

In the present case decided July 19, 1951, the Court of Appeals for the Fifth Circuit held that where the infringement was by sale of a product on the premises in Florida, such sales were not "in commerce" and, therefore, questions of infringement of a registered trade mark were removed from the case. Yet in *Bulova Watch Co. v. Steele, et al.,* 194 F. (2d) 567, decided February 21, 1952, the same Court, with a change of personnel, held that a Federal Court in Texas might enjoin a resident of Texas from using a Federally registered trade mark in Mexico on watches from parts purchased in Switzerland and the United States. In reviewing the decided cases pertaining to Federal jurisdiction, Judge Rives pointed out that as laid down in the celebrated *Trade Mark Cases,* 100 U. S. 82,

> "Property in trade-marks and the right to their exclusive use rest upon the laws of the several states and depend upon them for security and protection; the power of Congress to legislate on the subject being only such as arises from the authority to regulate commerce with foreign nations and among the several states and with the Indian tribes. In re Trade-Mark Cases, 100 U. S. 82, 93, 25 L. Ed. 550."

Turning then to the definition of ommerce" under the Lanham Act, he observed that it 's without limitation, and he further noted that in r nt cases the Supreme Court has held—

> "that an activity which is local its nature may be regulated by Congress if it e cises substantial economic effect on interstate co nerce. It is therefore apparent that purely in state uses may come under the provisions of th ct if they have a substantial economic effect on i rstate, territorial or foreign commerce."

2. While the issues of this case y not assume the political importance which is involv in the Steel Company cases, their economic importa to the manufacturers and distributors of food pro ts are almost impossible to estimate. Foods constit one of the principal items of commerce and the iestment in advertising of all forms to establish b d names extends into billions of dollars, and in fact nstitutes the principal investment of the industry. Ds also constitute the subject matter of the major c gory of Federally registered trade marks, and since t advent of the Lanham Act virtually every importan od trade mark has been brought under the jurisdicti of this Act. Needless to say that this action by virt ly every important manufacturer in conforming with e new law has involved the expenditures of many ions of dollars and was made with the expectation of ining greater benefits.

As the decision of the lower C t in this case now stands, confusion abounds and th dustry is at a loss as to what action can be taken. Si ce to say that as a result of this decision many meet s of industry mem-

bers have occurred to determine what, if anything can be done. As matters now stand and with this decision representing the opinion of at least one Circuit, manufacturers and distributors of nationally branded foods are liable to infringement which is sanctioned by the Courts who have failed to comprehend the intent of Congress with respect to an Act which was under active consideration for eight years before it was finally enacted.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BENEDICT DEINARD

Of Counsel,
ARTHUR S. CAINE.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 33 of the Rules of this Court.

BENEDICT DEINARD